

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of	)	RM-11358
Copper Loops by Incumbent Local Exchange	)	
Carriers	)	
	)	
Special Access for Price Cap Local Exchange	)	WC Docket No. 05-25
Carriers	)	
	)	
AT&T Corporation Petition for Rulemaking to	)	RM-10593
Reform Regulation of Incumbent Local Exchange	)	
Carrier Rates for Interstate Special Access Services	)	

**COMMENTS OF CENTURYLINK**

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**COMMENTS OF CENTURYLINK**

CenturyLink<sup>1</sup> hereby files its Comments in response to the Commission's *FNPRM* seeking to streamline the transition to an all-IP environment.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY.**

Last year, the Commission acknowledged (in this very proceeding) that three-quarters of customers had switched from ILEC wireline networks to interconnected VoIP and wireless networks for their voice services.<sup>3</sup> Since then, that figure has continued to grow.<sup>4</sup>

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<sup>1</sup> This filing is made on behalf of CenturyLink, Inc. and its subsidiary entities that are incumbent local exchange carriers.

<sup>2</sup> *In the Matter of Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 15-97 at ¶ 203 (rel. Aug. 7, 2015) (*FNPRM*).

<sup>3</sup> *In the Matter of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 14974-75 ¶ 9 (rel. Nov. 25, 2014) ("*NPRM*").

This undisputed evidence demonstrates irrefutably that consumers view interconnected VoIP and 3G/4G wireless voice services to be “reasonable substitute[s]”<sup>5</sup> for traditional telephone service.<sup>6</sup> The Commission itself has come to a similar conclusion with regard to facilities-based VoIP in a series of merger and forbearance orders,<sup>7</sup> and, more recently, for both interconnected VoIP and fixed wireless service meeting its standards for “voice telephony service” in the Connect America Fund (CAF) proceeding.<sup>8</sup>

Given these marketplace and regulatory developments, if any one of these services (or another provider’s TDM voice service) is available in an area where a carrier seeks to

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<sup>4</sup> In the *NPRM*, the Commission noted that interconnected VoIP comprised over a third of all wireline retail local telephone service connections, and that 41 percent of American households relied exclusively on wireless services. That latter number has now climbed to more than 45 percent. Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2014*, Centers for Disease Control and Prevention National Center for Health Statistics (June 2015), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf> (*CDC June 2015 Report*).

<sup>5</sup> See 47 C.F.R. § 63.71(a)(ii) (discontinuance “normally authorize[d] . . . unless it is shown that customers would be unable to receive service or a *reasonable substitute* from another carrier or that the public convenience and necessity is otherwise adversely affected.”) (emphasis supplied).

<sup>6</sup> CenturyLink’s comments focus on the ongoing migration from traditional wireline telephone services, *i.e.*, plain old telephone service (POTS), given that the *FNPRM* proposed criteria focus almost exclusively on features, functionalities and capabilities associated with POTS.

<sup>7</sup> See, *e.g.*, *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, 25 FCC Rcd 8622, 8650 ¶ 54 (rel. Jun. 22, 2010) (*Qwest Phoenix Forbearance Order*) (finding that “mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market.”)

<sup>8</sup> See *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform - Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (rel. Nov. 18, 2011) (subsequent history omitted) (*USF/ICC Transformation Order*).

discontinue wireline TDM voice service, there is no need for the fact-intensive inquiry proposed in the *FNPRM*. Instead, the Commission should establish a rebuttable presumption that each of these services—interconnected VoIP, 3G/4G wireless, “CAF-qualifying” fixed wireless service,<sup>9</sup> and TDM voice service—is a reasonable substitute for traditional telephone service. The Commission should thus amend Section 63.71 of its rules to specify that if an ILEC (or, for that matter, any carrier) seeking to discontinue TDM voice service in a given area certifies that all affected retail customers will have access to one or more of these services, either from the discontinuing carrier or at least one other provider, its application will be reviewed under Section 63.71’s streamlined processes. This approach would provide the certainty needed for ILECs and other providers to plan their transitions to IP services, while allowing the Commission to consider any unique issues raised by commenters in a discontinuance proceeding.

This approach is far superior to the *FNPRM*’s proposal to evaluate eight highly detailed criteria to ensure the availability of an “adequate” substitute, which in Public Knowledge’s words, means that the substitute service will “deliver[] the same capabilities, reliability, and other critical aspects of the old technologies” being replaced.<sup>10</sup> CenturyLink wholeheartedly agrees that any substitute service should comply with key public interest obligations, such as access to emergency service and disability services, which the Commission has already extended to VoIP and wireless services. But, in more than 70 years of considering discontinuance applications for a variety of technologies and services, the Commission has never found it necessary to establish a predefined checklist for a substitute service, based on the Commission’s

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<sup>9</sup> “CAF-qualifying” fixed wireless service refers to fixed wireless voice service that would qualify for CAF II support under the Commission’s rules, if provided with broadband service meeting the Commission’s performance requirements.

<sup>10</sup> CTC Technology & Energy, *A Brief Assessment of Engineering Issues Related to Trial Testing for IP Transition* at 1 (Jan. 13, 2014) (“*CTC Study*”), attached to Letter from Harold Feld, *et al.*, Public Knowledge, to Tom Wheeler, Chairman, FCC, GN Docket No. 12-353 (Jan. 13, 2014).

prediction of the features and functionalities that affected customers view as essential and therefore must be replicated. Instead, the Commission’s existing discontinuance process relies on affected customers to inform the Commission what they view as essential and when they will be harmed by a proposed discontinuance. This process has generally worked well, and, if anything, could be further streamlined.

Like the *NPRM*, the *FNPRM* fails to provide any explanation of why today’s technology transitions are different and require the point-by-point analysis outlined in the *FNPRM*—particularly given that the choices made by more than three-quarters of consumers already confirm the general availability of sufficient alternatives. The new framework proposed in the *FNPRM* would also require the Commission to “wad[e] through a complicated morass of applications”—exactly the result the Commission sought to avoid in launching this phase of the technology transition proceeding.<sup>11</sup>

This new framework also would be unlawful and inconsistent with well-established Commission precedent in at least four respects: it would prevent ILECs and other POTS providers from exiting the market in at least some circumstances; it would require a substitute service to have identical characteristics to the one being discontinued; it would ignore the availability of reasonably comparable substitute services provided by third parties; and it would be irreconcilable with Section 254 and the Commission’s CAF rules. The *FNPRM*’s new rules would also be burdensome, unnecessary and backward-looking.

While the *FNPRM* claims that the proposed criteria “will not serve to discourage carriers from seeking to innovate and develop new communications technologies[,],”<sup>12</sup> it will undoubtedly delay the deployment of such technologies and undermine competition. The

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<sup>11</sup> *NPRM*, 29 FCC Rcd at 14972 ¶ 5.

<sup>12</sup> *FNPRM* at ¶ 206 (citation omitted).

*FNPRM*'s new framework would require ILECs to either maintain underutilized legacy networks without a sufficient customer base or funding mechanism to recover those costs, *or* modify their IP-based replacement services to incorporate virtually every functionality of the TDM voice service they seek to discontinue. If the Commission adopts the new substantive requirements proposed in the *FNPRM*, an ILEC may well decide to put off its IP migration and maintain duplicative networks, simply because, though costly, it is less expensive than satisfying the new regulatory mandates imposed by the Commission through the discontinuance process. ILECs' competitors, of course, would not face this choice and would operate free from these new regulatory requirements the *FNPRM* would impose on ILECs. Ultimately then, the requirements contemplated by the *FNPRM* would render ILECs' offerings more expensive than their competitors', placing a heavy thumb on the economic scale and effectively *reducing* competition. Such a retrograde approach to discontinuance requirements has no place in the broadband era and would hobble the IP transition and harm consumers.

To the extent the Commission harbors concern about the impact of technology transitions on potentially vulnerable groups, such as the elderly and disabled, it should address those concerns through rulemaking, education, and outreach efforts, rather than on a piecemeal basis through Section 214 proceedings, as proposed in the *FNPRM*. Such education and outreach initiatives also provide the best means for reassuring reluctant end users to transition to new technologies, similar to the Commission's successful approach in the digital television transition.

As a final matter, the Commission should decline to adopt the *FNPRM*'s proposal to lengthen the discontinuance process and extend the equivalent access rule for commercial wholesale platform services.

**II. WHERE PROVEN ALTERNATIVES ARE AVAILABLE TO CONSUMERS, THERE IS NO NEED FOR THE FACT-INTENSIVE DISCONTINUANCE PROCESS PROPOSED IN THE *FNPRM*.**

CenturyLink heartily agrees that appropriate, predefined standards will streamline the Commission's determination whether a proposed discontinuance is consistent with the public interest. Yet the nature of those standards should vary depending on the substitute services that will be available to affected customers. There could be situations in which a carrier seeks to transition to an unproven technology and affected customers have limited access to alternative services from other providers. According to public interest groups, that's exactly what happened when Verizon sought to replace its destroyed wireline services in Fire Island with VoiceLink service. For such applications, the Commission might reasonably conclude that a fact-intensive inquiry is necessary to confirm that the replacement service constitutes a reasonable substitute for the service being discontinued.<sup>13</sup>

But this situation will not be the norm. In most cases, a carrier seeking to discontinue traditional telephone service will be replacing that service with interconnected VoIP service, and most, if not all, affected consumers will also have access to cable-provided VoIP service, a choice of 3G/4G wireless providers, and, in some cases, a fixed wireless or some other

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<sup>13</sup> Notably, Public Knowledge relied significantly on its observations regarding Fire Island to develop the framework on which the proposal in the *FNPRM* is based. *See* Letter from Harold Feld, et al., Public Knowledge, to Chairman Wheeler, FCC, GN Docket Nos. 12-353, 13-5, at 2 (Jan. 13, 2014) (“[A]s demonstrated by the recent events on Fire Island, technologies do not always scale. The Fire Island deployment of voice link disrupted credit processing and ATM withdrawals, as well as raised significant public safety concerns.”); *id.* at 5 (“As was demonstrated in Fire Island, when put in real-world contexts[,] next generation technologies may fail to support or be insufficiently reliable for features for routine business needs like credit card processing or ATM transactions.”) As noted below, however, even in this rare situation, the detailed criteria proposed in the *FNPRM* would be unnecessary and unwarranted.

alternative.<sup>14</sup> In these typical situations, there is simply no need for the exhaustive showings proposed in the *FNPRM*, which would be unlawful, unnecessary, and would unduly delay the transition to proven next-generation services and technologies.<sup>15</sup>

**A. The Commission's Existing Discontinuance Process Generally Works Well.**

The *FNPRM* implies, without explanation, that the Commission's current, time-tested discontinuance process is somehow inadequate to protect customer interests arising from the communications industry's latest technology transitions, thus requiring new, much more prescriptive, rules. That view does not comport with CenturyLink's experience. Given the complexity of the industry and the services provided, it is difficult for the Commission (or anyone) to anticipate which functionalities are most important to customers and whether a particular discontinuance will pose a hardship on one or more customers. The Commission's current discontinuance process provides a well-used forum for customers to provide such information to the Commission. And, if anything, the situation in Fire Island amply demonstrates citizens' ability to make their voices heard and demand different outcomes when concerned about the availability of reasonable alternatives to a service proposed to be

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<sup>14</sup> According to the Commission's *Seventeenth Wireless Competition Report*, 100 percent of the nation's non-rural population, and 99.3 of the rural population, lived in census blocks that were covered by at least one mobile voice provider in January 2014. *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15337 ¶ 53 (rel. Dec. 18, 2014) (*Seventeenth Wireless Competition Report*). Ninety-seven percent of the population is covered by the networks of at least three mobile voice providers. *Id.*, at 15428, Appendix III, Table III.A.ii.

<sup>15</sup> The Commission should not exempt rural LECs from any new discontinuance rules. For the reasons discussed herein, it would be unlawful and unreasonable to apply the proposed criteria to *any* provider. But if any of those criteria are adopted, there would be no justification for exempting rural LECs, which typically serve areas with fewer alternatives for consumers.

discontinued. When such concerns are expressed, the Commission has shown no hesitation in removing an application from the automatic grant process, if it deems such action necessary.<sup>16</sup>

If it wishes to streamline this process, the Commission should consider tweaking the existing process in two ways, in addition to adopting the rebuttable presumption noted. *First*, the Commission should establish a deadline for issuing the public notice that triggers the 60- or 31-day deadlines for automatic grant (depending on whether the service is considered “dominant” or “nondominant”). Release of this public notice, which is largely a ministerial task, currently can take upwards of three weeks in some cases, thus slowing down the discontinuance process. The Commission might fruitfully explore ways to automate or otherwise expedite this task. *Second*, the Commission could establish a second “automatic grant” deadline for situations in which the initial automatic grant deadline is suspended. This would avoid the need for the Commission or Bureau to later issue an order or public notice granting the discontinuance petition and addressing any opposition to that grant. In many cases, any concerns expressed in opposition to a discontinuance application can be resolved within 30 days, which may be a reasonable timeframe for a second automatic grant deadline, which itself could be suspended if necessary. Alternatively, the Commission could delegate authority to the Bureau to establish a second application-specific automatic grant date when it suspends the initial automatic grant date.

**B. The New Rules Proposed In The *FNPRM* Would Be Unlawful and Ignore Decades of Precedent.**

The *FNPRM*’s proposed discontinuance rules would conflict with Section 214 and decades of precedent. By requiring the provision of an “adequate substitute,” the new rules would preclude ILECs and other POTS providers from exiting the market in the absence of a

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<sup>16</sup> See, e.g., *Application of Qwest Communications Company, LLC D/B/A CenturyLink QCC To Discontinue Domestic Telecommunications Service Not Automatically Granted*, Public Notice, 28 FCC Rcd 16706 (rel. Dec. 13, 2013).

third party-provided service meeting this high standard. These rules would also generally require a substitute service to be functionally identical to the service being discontinued, despite longstanding precedent allowing discontinuance based on the existence of a “reasonable” or “comparable” alternative. Just as problematic, the new rules would, in practice, exclude evidence of third party-provided alternatives by requiring petitioning carriers to provide proprietary information available only to the third party, if at all. Finally, the proposed framework for evaluating discontinuance applications is irreconcilable with Section 254 and the Commission’s universal service rules.

**1. The New Rules Would Prevent POTS Providers From Exiting The Marketplace, In At Least Some Circumstances.**

Most troubling, the discontinuance criteria proposed in the *FNPRM* would prevent ILECs and other POTS providers from exiting the market, even when reasonable substitute services are available and subscribed to by more than three-quarters of consumers. The *FNPRM* lacks any explanation or justification for ignoring this compelling market evidence and requiring the availability of an “adequate” substitute, which, in many ways, would have to be *superior* to existing interconnected VoIP, 3G/4G wireless, CAF-qualifying fixed wireless, and TDM voice services. It would be arbitrary and capricious for the Commission to find that such availability is necessary for the “public interest and convenience.”<sup>17</sup>

As the Commission has consistently recognized, exit restrictions impose real harms and are to be avoided except where absolutely necessary. Moreover, restricting a provider’s ability to provide service in a more efficient manner—such as by replacing underutilized TDM voice services with VoIP—“would essentially require carriers to subsidize the continued use of . . .

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<sup>17</sup> See 47 U.S.C. § 214(a).

facilities to the detriment of their ratepayers.”<sup>18</sup> And “restricting carriers’ ability to respond to changing market conditions in the most efficient technological manner possible . . . would hamper their ability to perform in a competitive market.”<sup>19</sup> In short, ease of exit is “a fundamental characteristic of a competitive market . . . even though some customer dislocations might be attendant thereto.”<sup>20</sup>

The proposed rules potentially would require a carrier to offer the service in question, or a substitute for that service, indefinitely, in the event that no third party service meets the new regulatory requirements proposed in the *FNPRM*. In other words, the proposed rules will effectively prevent ILECs from discontinuing service.

This conflict with the statute and Commission arises from the proposal’s undue weight on the “adequate substitute” factor in the Commission’s longstanding five-factor analysis for evaluating discontinuance applications. What the *FNPRM* calls a “new primacy” of the “adequate substitute” factor would actually be a bar on discontinuance in the absence of a third party service that satisfies the eight criteria proposed in the *FNPRM*. Particularly given the wealth of alternatives generally available to today’s consumers, such a result would be arbitrary and capricious.

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<sup>18</sup> *In the Matter of Regulatory Policies Concerning the Provision of Domestic Pub. Message Servs. by Entities Other Than the Western Union Tel. Co. & Proposed Amendment to Parts 63 & 64 of the Comm’n’s Rules*, CC Docket No. 78-96, 7, Memorandum, Opinion and Order, 5 F.C.C.2d 345, 376 ¶ 104 (rel. Jan 7, 1980) (“*Domestic PMS Order*”), *aff’d sub nom. Western Union Telegraph Co. v. FCC*, 665 F.2d 1112 (D.C. Cir. 1981).

<sup>19</sup> *Id.*

<sup>20</sup> *In the Matter of Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 F.C.C.2d 1, 43 ¶ 147 (rel. Nov. 28, 1980) (subsequent history omitted) (*First Competitive Carrier Order*).

**2. The New Rules Would Require Identical Attributes To The Service Being Discontinued, And Place Undue—And Unprecedented—Weight On The “Adequate Substitute” Factor.**

The eight criteria proposed in the *FNPRM* rely principally on a Public Knowledge filing identifying ten “core technical features of the [PSTN].” Public Knowledge’s list is, in turn, based on a study by Columbia Telecommunications Corporation, which presumes that the goal of the IP transition is to ensure that the “new IP environment delivers the same capabilities, reliability, and other critical aspects of the old technologies” being replaced.<sup>21</sup> This view is badly mistaken. Section 214(a) does *not* require that a reasonable substitute be an “exact substitute[] for” the discontinued service.<sup>22</sup> Consumers have shown themselves to be eager to abandon the supposedly “critical aspects of” TDM wireline voice service for other technologies. They have chosen the mobility and convenience of wireless services and the lower cost, greater capacity and flexibility of VoIP and other IP-enabled features over ILEC legacy services. The study upon which the *FNPRM*’s proposed criteria are indirectly based thus is predicated on a fundamentally flawed legal and economic premise—namely, that the Commission’s role in facilitating the IP transition is to perpetuate the specific characteristics (and costs) associated with the legacy PSTN rather than facilitating a shift to the services and features that customers actually demand.

For many of these criteria, any claim that they are essential has been repudiated by consumers, who have voted with their feet and their dollars. For example, the Public Knowledge-sponsored study states that successor technologies should be required to achieve “the

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<sup>21</sup> See *CTC Study* at 1.

<sup>22</sup> *In the Matter of AT&T Corp.*, File No. ITC-MS-19981229-00905, Memorandum Opinion and Order, 14 FCC Rcd 13225, 13229 at ¶ 9 (rel. Aug. 9, 1999) (*AT&T High Seas Order*).

standards of the PSTN in its current state[]”<sup>23</sup> – *i.e.*, availability of 99.9 percent.<sup>24</sup> Similarly, the *FNPRM* tentatively concludes that any replacement or alternative service meet state minimum service quality standards applicable to POTS service.<sup>25</sup> But more than 45 percent of customers have abandoned the legacy services guaranteed to provide this level of availability and service quality. Likewise, Public Knowledge’s study identifies call persistence (which is incorporated in the *FNPRM*’s *Network Capacity and Reliability* criterion) as “one of the distinguishing attributes of the wireline network, relative to wireless.”<sup>26</sup> If so, then the overwhelming movement from wired to wireless offerings demonstrates specifically that customers *do not* value persistence enough to pay for it.

Given these facts, the proposal in the *FNPRM* would be a gross departure from decades of precedent. In considering petitions to discontinue service, the Commission has always looked to the availability of a “reasonably comparable” alternative, rather than an exact substitute, for the service being discontinued. By ignoring this well-established precedent, the *FNPRM* would unreasonably discount the other factors in the Commission’s traditional five-factor test for considering petitions to discontinue service.

Under Commission precedent, discontinuance will be granted “when service alternatives are likely to exist, . . . even though some customer dislocations might” result.<sup>27</sup> Discontinuances are permissible so long as reasonably comparable retail services are available to consumers, even if the alternatives are not functionally identical and/or are offered at higher prices. For example,

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<sup>23</sup> *CTC Study* at 5.

<sup>24</sup> *Id.* at 18-19.

<sup>25</sup> *FNPRM* at ¶ 218.

<sup>26</sup> *CTC Study* at 24.

<sup>27</sup> *First Competitive Carrier Order*, 85 F.C.C.2d at 43, 49 ¶¶ 128, 147.

the Commission affirmed the grant of AT&T's request to discontinue its Terrestrial Television Service ("TTS") to certain locations and universal TTS connectivity between the remaining served locations partly on the grounds that satellite services provided a "comparable alternative to" TTS and that point-to-point connections constituted an adequate replacement for the universal connectivity that was eliminated.<sup>28</sup> And, in the *Verizon Copper Discontinuance Order*, the Wireline Competition Bureau found that, because "*almost all of the . . . services previously available over copper . . . are also available over fiber,*" there is minimal, if any, need for the discontinued services or facilities.<sup>29</sup>

Similarly, in the *AT&T High Seas Order*, AT&T was permitted to discontinue its High Seas high frequency radio-telephone service because its customer base was "steadily shrinking" and "reasonable alternative services are available."<sup>30</sup> The International Bureau found that, although satellite-based radio telephone services imposed higher costs and offered less robust coverage than AT&T's High Seas service, those differences did not render satellite-based service "nonviable as a substitute" for the High Seas service, and thus did not preclude approval of AT&T's request to discontinue those offerings.<sup>31</sup> Thus, the satellite-based service was a reasonable substitute, even though it was not an "exact" substitute.<sup>32</sup>

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<sup>28</sup> *In the Matter of Am. Telephone and Telegraph Co.*, File No. W-P-D-350, Memorandum Opinion and Order, 8 FCC Rcd 6801, 6802 ¶ 13, 6803 ¶ 16 (Sept. 13, 1993).

<sup>29</sup> *In the Matter of Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. for Authority to Discontinue Domestic Telecommunications Services*, WC Docket No. 13-149, Order, 28 FCC Rcd 13826, 13830 ¶ 10 (rel. Sept. 24, 2013) (emphasis added).

<sup>30</sup> *AT&T High Seas Order*, 14 FCC Rcd at 13229 ¶ 8.

<sup>31</sup> *Id.* at 13229-30 ¶¶ 9-11.

<sup>32</sup> *Id.* at 13229 ¶ 9. The Bureau also found that customers could use other types of services, such as cellular service, noting that "[v]iable alternatives to a discontinued service need not be the same type of service." *Id.* at 13233 ¶ 16 n.27.

In contrast, a number of the criteria in the *FNPRM* would require that the substitute service provide equal, if not superior, performance for the specified functionality, as compared to the service to be discontinued—even beyond public interest-based obligations such as 911 and services for individuals with disabilities:

- *Network Capacity and Reliability* – “[T]he replacement or alternative service ‘[must] (a) afford *the same or greater* capacity as the existing service and (b) afford *the same* reliability as the existing service’”;<sup>33</sup>
- *Service Quality* – “[A]ny replacement or alternative service [will] meet[] the minimum service quality standards set by the state commission responsible for the relevant service area” (which generally do not apply to VoIP or wireless services);<sup>34</sup>
- *Device and Service Interoperability* – Petitioner’s “replacement service or the alternative services available from other providers in the relevant service area [must] allow for *as much or more* interoperability of both voice and non-voice devices, or newer technology-based equivalent devices, as the service to be retired.”<sup>35</sup>
- *Service Functionality* – “[A]ny replacement [service] offered by the requesting carrier or alternative service available from other providers in the relevant service area [must] permit similar service functionalities as the service for which the carrier seeks discontinuance authority.”<sup>36</sup>

While it appears that strict compliance with all of these criteria may not be required if the Commission conducts a full-blown inquiry (because the petitioner cannot certify that a substitute service meets each and every criterion), the *FNPRM* strongly suggests that the Commission

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<sup>33</sup> *FNPRM* at ¶ 216 (emphasis added).

<sup>34</sup> *FNPRM* at ¶ 218. Curiously, the *FNPRM* seeks comment on the use of tools to measure speed performance for data services, even though such broadband services are not subject to Section 214 discontinuance requirements. *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 ¶¶ 509-10 (rel. Mar. 12, 2015) (forbearing from Section 214 requirements for consumer broadband services), *appeals pending sub nom.*, Nos. 15-1063, *et al.*, *USTelecom v. FCC* (D.C. Cir., *pet. for rev. filed* Mar. 23, 2015 *and oral argument scheduled for* Dec. 4, 2015).

<sup>35</sup> *FNPRM* at ¶ 219 (emphasis added).

<sup>36</sup> *FNPRM* at ¶ 229.

would expect a close correspondence between most, if not all, the functionalities of the substitute service and the service proposed to be discontinued.

As noted, the *FNPRM* compounds this problem by placing undue weight on the “adequate substitute” factor, even though it recognizes that it is “merely one factor in the overall discontinuance analysis[,]”<sup>37</sup> which is sometimes outweighed by other factors. In the *Verizon Expanded Interconnection Order*, for example, the Commission permitted Verizon to discontinue its physical collocation service and offer virtual collocation instead because requiring it to offer both created “a financial burden for Verizon, due to the administrative burdens of maintaining two separate regulatory offerings for the same service and the opportunities for regulatory arbitrage.”<sup>38</sup> And in the *Wireline Broadband Order*, the Commission recognized the need for a pro-competitive application of Section 214(a),<sup>39</sup> so as not to burden carriers with “costly redundant systems and duplicative processes that result in operational inefficiencies” and thereby “harm the public interest by impeding the deployment of innovative broadband infrastructure and services responsive to consumer demands.”<sup>40</sup> Thus, avoiding impediments to technological innovation that are caused by having to continue providing an unneeded service have always been a significant factor justifying discontinuance. Yet the *FNPRM*’s extreme interpretation of the “adequate substitute” requirement would ignore

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<sup>37</sup> *FNPRM* at ¶ 210.

<sup>38</sup> *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22743 ¶ 10.

<sup>39</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14907-08 ¶¶ 100-01 (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”) (granting blanket discontinuance of transmission component of Internet access service on a stand-alone basis), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 205 (3d Cir. 2007).

<sup>40</sup> *Id.* at 14889, 14907-08 ¶¶ 68, 100 n.302. *See also id.* at 14891 ¶ 71 (“these costs, inefficiencies, and delays” can “substantially impede network development” and technological innovation).

this delicate balancing and thereby conflict with Section 214 and the Commission's application of that statutory provision.<sup>41</sup>

**3. The New Rules Would Ignore The Availability Of Reasonably Comparable Services Provided By Third Parties.**

The *FNPRM* correctly acknowledges that the Commission “must evaluate the availability of alternative services from sources other than the carrier seeking section 214 discontinuance authority[.]”<sup>42</sup> and purports to allow the proposed criteria to be satisfied by a third party offering (as well as petitioner's replacement service).<sup>43</sup>

But, in practice this is very unlikely under the *FNPRM*'s proposed framework for two reasons. To obtain an automatic grant based on a third party's service offering, the petitioner would have to certify that the service satisfies each of the criteria and provide “a detailed statement explaining the basis for such certification.”<sup>44</sup> It is unclear how an officer or representative from CenturyLink, for example, could ever acquire sufficient information to certify that Comcast's VoIP service or Sprint's 3G/4G service meets the *FNPRM*'s defined metrics for latency, jitter, packet loss, and through-put, satisfies the minimum service quality standards set by the state commission responsible for the relevant service area, and conforms to

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<sup>41</sup> See, e.g., *Inquiry into Problems of Public Coast Radiotelegraph Stations*, Docket No. 19544 RM-1838, 67 F.C.C.2d 790 at ¶ 11 (rel. Feb. 27, 1978) (noting the Commission's “delicate task of balancing the legitimate interests of both the carriers (and their investors) and the user community.”)

<sup>42</sup> *FNPRM* at ¶ 206 (footnote omitted). Reasonable alternatives from any source have been held to be adequate substitutes for a discontinued service, justifying grant of a Section 214(a) application. See, e.g., *In the Matter of Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, NSD File No. W-P-D-517, Order, 16 FCC Rcd 17024, 17027 ¶ 8 (rel. Sept. 24, 2001); *AT&T High Seas Order*, 14 FCC Rcd 13225, 13229-33 ¶¶ 8-16 & n.27, *recon. denied*, 16 FCC Rcd 13636 (rel. July 10, 2001).

<sup>43</sup> *FNPRM* at ¶ 213.

<sup>44</sup> *FNPRM* at ¶ 212.

the *FNPRM*'s other detailed requirements related to interoperability, disabilities access, PSAP and 9-1-1 service, communications security, service functionality, and coverage. Even in the unlikely event such information were publicly available, a company officer or representative could not reasonably certify, under penalty of perjury,<sup>45</sup> that such unsubstantiated information is accurate. Thus, it is highly unlikely that a third party's substitute service could trigger an automatic grant under the new rules proposed in the *FNPRM*.

Absent that, the *FNPRM* would require the petitioner "to submit information demonstrating the degree to which [the third party's service] meets or does not meet each factor[.]"<sup>46</sup> But again, it is not at all clear how a petitioner could obtain such proprietary information about another provider's service, which presumably is in the third party's sole possession—assuming it even exists. Absent compelled disclosure by the third party, such information simply cannot be provided, and the new rules would not permit the service to be discontinued, even if a third party does in fact offer an "adequate substitute," as defined in the Commission's new discontinuance rules.

There also is no reason to expect that third parties would comply with the numerous new regulatory obligations that the *FNPRM* proposes as conditions of discontinuance authority, including new network capacity, reliability, and service quality standards, interoperability requirements, and IP-based real-time texting and high-definition voice capabilities. A petitioner thus could not rely on those third party services to fulfill the relevant criteria, even though market evidence indicates that consumers view those services as a reasonable substitute for the

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<sup>45</sup> See *FNPRM* at ¶ 212 ("The certification would be subject to the requirements of section 1.16 of the Commission's rules and be subscribed to as true under penalty of perjury in substantially the form set forth in the rule [citation omitted].")

<sup>46</sup> See *FNPRM* at ¶ 210.

service proposed to be discontinued. Such a result cannot be squared with the statute or the Commission's application of that statute for seventy plus years.

#### **4. The Proposed Framework Is Irreconcilable With Section 254 And The Commission's CAF Rules.**

Historically, federal universal service support has been limited to voice services provided over TDM networks. In the 2011 *USF/ICC Transformation Order* the Commission updated its rules to make other reasonably comparable voice services eligible for universal service support as well. In doing so, the Commission observed that consumers were increasingly "obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks," and that such VoIP services "increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services."<sup>47</sup> Exercising its authority under Section 254, the Commission therefore modified its rules to allow USF support for "voice telephony service," which it defined in a manner that includes interconnected VoIP services.<sup>48</sup> The Commission noted that this broadening of voice services eligible for USF support "should not result in a lower standard of voice service," but "simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks."<sup>49</sup> The Commission also found that this modification would "benefit both providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings)"

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<sup>47</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17685 ¶ 63.

<sup>48</sup> *See id.*, 26 FCC Rcd at 17684-85 ¶¶ 62-63. *See also* 47 C.F.R. § 54.101(a) ("Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers[.]")

<sup>49</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17692 ¶ 78.

and “promote technological neutrality while ensuring that [the] new approach does not result in lower quality offerings[.]”<sup>50</sup> Notably, the Commission felt no need to require USF-supported voice services to comply with detailed performance criteria, such as those proposed in the *FNPRM*.<sup>51</sup>

In a series of subsequent orders, the Commission clarified that CAF II support would be unavailable in any census block in which a subsidized or unsubsidized competitor offers its own “residential terrestrial fixed [] voice service,” which includes interconnected VoIP or fixed wireless voice service offered with fixed broadband service meeting specified upload and download speeds.<sup>52</sup>

Last year, the Commission forbore from a price cap carrier’s ETC obligation to provide voice service in situations where its universal service funding is eliminated because another provider is offering voice and broadband service meeting the Commission’s CAF II benchmarks,<sup>53</sup> but noted that the ILEC could not cease providing voice service without discontinuance approval under Section 214(a).<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> Over the objections of CWA, the Commission also eliminated the obligation for ETCs to provide certain legacy services, such as operator services and directory assistance, given that “the importance of these services to telecommunications consumers has declined with changes in the marketplace.” *USF/ICC Transformation Order*, 26 FCC Rcd at 17692 n.114.

<sup>52</sup> See *In the Matter of Connect America Fund*, WC Docket No. 10-90, Report and Order, DA 13-1113, 28 FCC Rcd 7211, 7215 ¶¶ 6-10 (rel. May 16, 2013); *In the Matter of Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 10-90; WC Docket No. 14-58; WC Docket No. 14-192, Report and Order, FCC 14-190, 29 FCC Rcd 15644, 15671-15672 ¶¶ 73-74 (rel. Dec. 18, 2014) (*2014 CAF II Order*); *In the Matter of Connect America Fund; In the Matter of Connect America Phase II Challenge Process*, WC Docket No. 10-90; WC Docket No. 14-93, Order, DA 15-383, 30 FCC Rcd 2718, 2722 ¶ 14 (rel. Mar. 30, 2015).

<sup>53</sup> *2014 CAF II Order*, 29 FCC Rcd at 15663 ¶ 51.

<sup>54</sup> *Id.*, 29 FCC Rcd at 15666, 15667 ¶¶ 60-61.

Despite the Commission's suggestions to the contrary, these decisions in the CAF proceeding are inextricably linked to the Commission's consideration of petitions to discontinue traditional telephone service. Specifically, it would be patently unreasonable for the Commission to find that a given voice service is sufficient to qualify for CAF II support (or to disqualify CAF II support if the service is provided by another), but that it is not an "adequate" substitute to allow a POTS provider in that area to discontinue service.

This can be illustrated by two simple hypotheticals concerning an ILEC that historically has provided POTS service in a given rural area, supported by federal high cost support. In the first hypothetical, imagine that the Commission identifies that rural area eligible for CAF II support (because no unsubsidized provider offers qualifying voice and broadband service) and the ILEC petitions to discontinue POTS service in that area, as it can more efficiently meet its voice telephony obligation by providing interconnected VoIP or fixed wireless service. In the second hypothetical, assume that the Commission determines that the rural area is *not* eligible for CAF II support (because another carrier provides interconnected VoIP or CAF-qualifying fixed wireless voice service along with fixed broadband service meeting CAF performance requirements). This time, the ILEC concludes that, without USF support, it cannot profitably provide POTS in the rural area, so it petitions to discontinue that service offering.

In both hypotheticals, if the substitute VoIP or fixed wireless voice service does not meet the Commission's new discontinuance criteria, the ILEC will be prohibited from exiting the market and be forced to maintain duplicative or money-losing POTS indefinitely. Such an outcome would be both unfair and unlawful.<sup>55</sup> It also would ignore the fact that, even if a price

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<sup>55</sup> Forcing the ILEC to provide unprofitable service in the second hypothetical, without sufficient government support, would also amount to an unreasonable taking under the Fifth Amendment

cap carrier exists such an area, “there will be at least one provider in that area offering a voice telephony service that is reasonably comparable to service available in urban areas.”<sup>56</sup>

**C. The *FNPRM*’s New Discontinuance Rules Would Be Burdensome, Unnecessary and Backward-Looking.**

In the *FNPRM*, the Commission expresses its intent to eliminate uncertainty and expedite the transition to IP and wireless services.<sup>57</sup> The proposed criteria in the *FNPRM* will not accomplish these objectives. It will create a burdensome and inefficient process, resulting in both uncertainty and delayed deployment of next-generation technologies. In particular, it will require petitioning providers to re-litigate repeatedly questions of whether certain types of services are “adequate” substitutes for POTS, and require the Commission to “wad[e] through a complicated morass of applications”—exactly the result the Commission sought to avoid in launching this phase of the technology transition proceeding.<sup>58</sup> Especially if a petitioner cannot certify compliance with one or more of the criteria, or a commenter challenges a certification, the Commission will be enmeshed in disputes related to network capacity and reliability, service quality, interoperability, call functionality, cybersecurity and other highly technical issues that would take months to resolve—especially since these criteria would be factored into the Commission’s existing discontinuance standard in a completely undefined way. The *FNPRM* thus exaggerates the degree to which its adoption of “clear criteria” would eliminate uncertainty and “actuat[e] a rapid and prompt transition to IP and wireless technology.”<sup>59</sup> Given that more

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to the U.S. Constitution. See U.S. Constitution, 5<sup>th</sup> Amendment (“[N]or shall private property be taken for public use, without just compensation.”)

<sup>56</sup> See *2014 CAF II Order*, 29 FCC Rcd at 15668 ¶ 63.

<sup>57</sup> See *FNPRM* at ¶ 203.

<sup>58</sup> *NPRM*, 29 FCC Rcd at 14972 ¶ 5.

<sup>59</sup> See *FNPRM* at ¶ 203.

than three-quarters of customers have voluntarily migrated to widely available substitute services, there is simply no justification for this inefficiency and delay.

At the same time, the Commission should recognize two realities regarding the TDM-to-IP transition. First, it is unrealistic and counterproductive—despite Public Knowledge’s arguments to the contrary—to expect a new generation of communications services to include every functionality of the service that it is replacing.<sup>60</sup> By its nature, technological evolution entails tradeoffs. Some functionalities of the legacy service will still be provided, but just in a different way. For example, the mobility inherent in non-fixed wireless services makes it much more difficult to pinpoint a wireless phone to a street address for 9-1-1 purposes, but mobile wireless providers achieve similar functionality using latitude and longitude.<sup>61</sup>

Other functionalities are inherently tied to the legacy network or services and therefore may not be feasible in the alternative service. For example, traditional fax machines were designed for analog networks, making it difficult for them to function reliably on packet-based VoIP networks. Yet the availability of computer-based fax systems and other alternatives allow this issue to be easily overcome.<sup>62</sup> And, if there is sufficient demand for physical fax machines, equipment manufacturers will surely design fax machines that work reliably over VoIP

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<sup>60</sup> See *CTC Study* at 1.

<sup>61</sup> *In the Matter of Wireless E911 Location Accuracy Requirements*, 30 FCC Rcd 1259, 1261 ¶ 6 (rel. Feb. 3, 2015) (requiring CMRS providers to provide street address or x/y location within 50 meters for specified percentage of wireless 911 calls, which increases each year).

<sup>62</sup> See, e.g., eFax website, [http://home.efax.com/s/r/fax-by-email/?VID=33675&gclid=Cj0KEQjwkqKxBRCIrK\\_riNm13Z8BEiQAdzdVkBhT2u\\_RHaRk0vb-xZIIv88nlH3CTfItwExgcS\\_QD0aAjvP8P8HAQ&gclsrc=aw.ds](http://home.efax.com/s/r/fax-by-email/?VID=33675&gclid=Cj0KEQjwkqKxBRCIrK_riNm13Z8BEiQAdzdVkBhT2u_RHaRk0vb-xZIIv88nlH3CTfItwExgcS_QD0aAjvP8P8HAQ&gclsrc=aw.ds); *How to Send a Fax from Your Phone*, Verizon Wireless website, <http://www.verizonwireless.com/mobile-living/tech-smarts/send-fax-from-phone-mobile-fax/> (noting various fax available on smartphones) (last visited Oct. 22, 2015).

networks. In the meantime, no one would reasonably argue that the migration to VoIP services should be halted because a consumer's \$99 fax machine will not work with VoIP.<sup>63</sup>

The key is to distinguish between those attributes critical to the public interest—such as access to emergency services and accessibility for those with disabilities—and those that are not. Fortunately, the Commission has already largely addressed this issue by extending such public interest requirements to the substitute services in question (*i.e.*, interconnected VoIP, 3G/4G wireless and fixed wireless service).

This leads to a second reality of the IP transition. A small percentage of consumers will not voluntarily migrate to VoIP, even if it were 100% functionally equivalent to their existing phone service. Whether due to inertia, habit, or comfort with the familiar, these “late adopters” will not move of their own accord, even if provided financial incentives, and they ultimately will need to be nudged off legacy networks, as occurred in the DTV transition. In fact, a similar dynamic occurs in other industries as well. For example, a consumer may find that an older version of software no longer works with a new operating system,<sup>64</sup> and therefore is “forced” to buy a new version of that software. While providers have a vested interest in minimizing their customers' inconvenience, such inconvenience is inherent to some degree in technological evolution.

To the extent the Commission does apply the framework proposed in the *FNPRM*, it should particularly omit backwards-looking criteria. For example, it would be wasteful for the

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<sup>63</sup> Of course, the Commission must identify those functionalities that are essential to the public interest, which it has already done by extending key regulatory requirements, such as 911 and disabilities access, to VoIP and wireless services.

<sup>64</sup> See Microsoft website, *Make older programs compatible with this version of Windows*, available at <http://windows.microsoft.com/en-us/windows-8/older-programs-compatible-version-windows> (“Most programs created for earlier versions of Windows will work in this version of Windows, but some older programs might run poorly or not at all.”) (last visited Oct. 14, 2015).

Commission to require ILECs to engineer analog capabilities into their VoIP services, merely so customers can continue to use outdated fax machines, alarm systems, and medical monitoring devices over a technology that was never designed to accommodate them.<sup>65</sup> This is especially true given that wireless and web-based substitutes are readily available to consumers.<sup>66</sup> For example, customers may be able to convert their existing POTS-based system to wireless, or alternatively they could move to a more feature-rich web-based system.<sup>67</sup> And if the Commission concludes that owners of particular types of equipment need assistance in transitioning to new generations of such equipment, it should address that issue directly, rather than mandating inefficient technology choices.

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<sup>65</sup> If the Commission concludes such interoperability is necessary, it should require it for *all* VoIP providers, rather than adopting de facto rules in the Section 214 process that apply to only certain providers.

<sup>66</sup> See, e.g., Medical Alert Systems HQ: Reviews and Comparisons to Help You Find the Best System, available at <http://medicalalertsystemshq.com/guides/medical-alert-systems-that-work-without-a-home-phone-line.html> (describing medical monitoring system with built-in cellular capability) (last visited Oct. 25, 2015); *Life Alert*, By *Life Alert Emergency Response, Inc.*, Apple iTunes website, <https://itunes.apple.com/us/app/life-alert/id439126489?mt=8> (Life Alert emergency alert system available as an app through iTunes) (last visited Oct. 25, 2015); *How Wireless Home Alarm Systems Work*, Brick House Security website, <http://www.brickhousesecurity.com/category/alarm+systems/how+wireless+alarms+work.do> (last visited Oct. 21, 2015).

<sup>67</sup> See, e.g., Butler Durrell Security website, <http://www.butlerdurrellsecurity.com/residential/specials/> (St. Louis-based security company offering to convert compatible home security systems to cellular for \$69.95 installed). Regarding web-based systems, CenturyLink's Smart Home product includes remote video monitoring, temperature management, electronic door locks, lighting control, and web, smartphone, and tablet access, in addition to home security. See CenturyLink website, <https://promotions.centurylink.com/offers/smart/> (last visited Oct. 24, 2015).

**D. The New Rules Would Delay The IP Transition And Undermine Competition.**

While the *FNPRM* claims that the proposed criteria “will not serve to discourage carriers from seeking to innovate and develop new communications technologies[,]”<sup>68</sup> it will undoubtedly delay the deployment of such technologies. A process that should be straightforward, with an “automatic grant” deadline of 60 days, will now stretch for many months, as the petitioner compiles the data and information necessary to satisfy the Commission’s detailed criteria. And this assumes that the petitioner can meet each of the criteria. Particularly if the Commission adopts costly new requirements, as proposed in the *FNPRM*, a petitioner may well decide to put off the IP migration and maintain duplicative networks, simply because it is less expensive than satisfying the new mandates imposed by the Commission through the discontinuance process.

If ILECs are blocked from transitioning their operations to the services sought by consumers, consumers would be stuck with services they do not want—or forced to shift to other providers—and ILECs will be kept out of the new services markets as viable competitors. Such an unbalanced approach will stunt and delay broadband investment and the evolution of the network, to the ultimate detriment of American consumers. ILECs cannot upgrade their networks, if forced to maintain two parallel networks, or to engineer next-generation networks to mimic the functionalities of century-old copper lines. To maintain and promote robust investment and competition, the Commission must ensure that ILECs and their customers are not alone saddled with the costly technologies of the past.

The forced inefficiencies and costs that would be imposed by the proposal in the *FNPRM* thus would harm both competition and consumers. ILECs’ competitors, of course, would not

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<sup>68</sup> *FNPRM* at ¶ 206 (citation omitted).

face these constraints. They could upgrade their networks without worrying about the immense operational expenses associated with running duplicative networks—and without subjecting customers to the charges necessary to cover those costs. The ILECs’ competitors will also operate free of the numerous additional requirements the *FNPRM* would impose on ILECs, as a condition of discontinuing their legacy POTS services, and the expense of complying with those requirements.

Ultimately, then, the requirements contemplated by the *FNPRM* would render ILECs’ offerings more expensive than their competitors’, placing a heavy thumb on the economic scale and effectively *reducing* competition. Such a retrograde approach to discontinuance requirements has no place in the broadband era.

**E. The Commission Should Adopt Any New Regulatory Requirements Through Its Rulemaking Processes.**

The Commission should also not use the Section 214 discontinuance process to address issues that should be dealt with by rulemaking. For example, the *FNPRM* proposes to require those seeking discontinuance authority to provide IP-based real time text to replace TTY text services or high definition (HD) voice service as part of their VoIP offerings.<sup>69</sup> Such new requirements would impose real costs and delay on the transition to IP services. And, regardless of the merits of such potential rules, a carrier-specific proceeding is not the place to impose such requirements, which should apply either to all VoIP providers or no VoIP providers.<sup>70</sup> Similarly, if the Commission is concerned that, or questions whether, a particular next-generation service

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<sup>69</sup> See *FNPRM* at ¶¶ 223, 224.

<sup>70</sup> The *FNPRM* acknowledges CenturyLink’s contention that accessibility is the subject of an industry-wide proceeding and should not be addressed “ad hoc” in this proceeding, but then proposes, without further justification, to do just that. See *FNPRM* at ¶ 223.

includes adequate 911 or network security capability, it should use existing industry-wide mechanisms to explore these issues.

The *FNPRM*'s proposed framework thus would shift policy debates over appropriate regulation in a competitive, multi-platform communications environment from the rulemaking context, where they belong, to the carrier-specific Section 214 discontinuance process. For example, the *FNPRM* asks whether a VoIP service that provides only a limited amount of battery backup for CPE would “serve as an adequate substitute to reach 9-1-1 in an emergency[.]”<sup>71</sup> But, of course, the Commission adopted new rules on battery backup services for VoIP services just two months ago.<sup>72</sup> Does the Commission really contemplate now imposing more stringent battery backup requirements for ILEC-provided VoIP services alone, in the context of the Section 214 discontinuance process?

In fact, this is just one of a number of proposals in the *FNPRM* that would unfairly target ILECs for special obligations that their competitors do not face. For example, the *FNPRM* proposes that a petitioner demonstrate that its replacement service or that of another provider in the service area “allow for as much or more interoperability of both voice and non-voice devices, or newer technology-based equivalent devices, as the service to be retired.”<sup>73</sup> The *FNPRM* goes on to suggest that the Commission might require a petitioner's replacement service to comply with a particular modem standard, such as ITU T.38, despite the fact that other major providers' VoIP services apparently do not meet this standard.<sup>74</sup> If a petitioner relies on its own VoIP

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<sup>71</sup> *FNPRM* at ¶ 225.

<sup>72</sup> *In the Matter of Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Report and Order, FCC 15-98 (rel. Aug. 7, 2015).

<sup>73</sup> *FNPRM* at ¶ 219.

<sup>74</sup> See *CTC Study* at 14-15 (suggesting that alarm systems and medical alarm systems may not work reliably with the VoIP services of Cablevision, Vonage and Comcast).

service as an “adequate substitute,” it appears that it would have to add this functionality to its VoIP service, even though no other VoIP provider is subject to this obligation. Section 214 was never intended to impose such technological mandates on carriers. Such industry-wide questions are properly considered in industry-wide proceedings.

### **III. THE COMMISSION SHOULD ADOPT A REBUTTABLE PRESUMPTION THAT CERTAIN ESTABLISHED TECHNOLOGIES ARE ADEQUATE SUBSTITUTES FOR TRADITIONAL TELEPHONE SERVICE.**

The Commission should adopt a rebuttable presumption that interconnected VoIP service, 3G/4G wireless, CAF-qualifying fixed wireless service, and TDM voice service—whether provided by the petitioner or a third party—is a reasonable substitute for traditional TDM voice service. The Commission can implement this presumption by amending Section 63.71 of its rules to specify that if an ILEC (or, for that matter, any carrier) seeking to discontinue TDM voice service in a given area certifies that all affected retail customers will have access to one or more of these substitute services, that application will be reviewed under Section 63.71’s streamlined processes. This presumption would greatly streamline impacted Section 214 proceedings, because carriers would know upfront the showing necessary for this part of the Section 214 test, and equipment manufacturers would be put on notice of the need to design equipment compatible with these networks, if feasible and in sufficient demand. By definition, a rebuttable presumption can be rebutted, so affected consumers (and consumer interest groups) would have the opportunity to inform the Commission of any perceived shortcomings with the substitute service (or services) in question. And, of course the Commission would continue to retain discretion to remove a discontinuance application from the

automatic grant process, if it has concerns about some aspect of the substitute service or the proposed timeline for the transition—just as it does routinely today.<sup>75</sup>

If the Commission questions whether one or more of these services is a reasonable substitute for traditional telephone service in some way, then it should seek the necessary information and address those perceived inadequacies now, on an industry-wide basis, as it is doing for battery backup functionality for VoIP services.<sup>76</sup> Waiting to address such issues, on a case-specific basis, in the context of a Section 214 proceeding would be both inefficient and guaranteed to delay IP migration. Such piecemeal, de-facto rulemaking would also be under-inclusive, as it would apply only to providers that have sought to discontinue a legacy service.

#### **A. VoIP.**

At the end of 2013, slightly more than half of residential wireline local telephone connections were provided through interconnected VoIP.<sup>77</sup> Given this market evidence, it should be unnecessary for a petitioner to demonstrate that such VoIP service is a reasonable substitute for TDM voice service. The Commission can reasonably presume, for example, that major cable companies have adequate capacity to serve their millions of voice customers, that they are fulfilling applicable legal obligations related to 911, disability access, and other key regulatory issues, that they have taken necessary steps to secure their networks, and that they are providing the equipment compatibility that matters to consumers. The market doesn't lie. The fact that millions of customers have voluntarily switched to, and remained with, VoIP service is a much

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<sup>75</sup> *Application of Sprint Communications Company L.P. To Discontinue Domestic Telecommunications Services Is Not Automatically Granted*, WC Docket No. 15-186, Public Notice, DA 15-1055 (rel. Sept. 18, 2015).

<sup>76</sup> *In the Matter of Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Report and Order, FCC 15-98 (rel. Aug. 7, 2015).

<sup>77</sup> *Local Telephone Competition: Status as of December 31, 2013*, at 3, Fig. 2 (Oct. 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-329975A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf).

more reliable (as well as efficient) indicator that interconnected VoIP service is a reasonable substitute for TDM voice service than officer certifications and service quality measurements.

And the Commission has already taken steps to ensure that interconnected VoIP services fulfill the key regulatory obligations that apply to landline TDM voice service: access to 9-1-1 service; disability access, outage reporting; number portability, and CALEA.<sup>78</sup> Unless there is evidence of widespread noncompliance with these requirements—which there is not—there is no justification for requiring a Section 214 petitioner to certify such compliance.

Such a rebuttable presumption would also be consistent with the Commission’s treatment of these substitute services in other contexts. In a series of merger and MSA forbearance orders over the past decade, including the *Qwest Phoenix Forbearance Order*, the Commission concluded that facilities-based VoIP service is a reasonable substitute for traditional wireline telephone service.<sup>79</sup> Given that these conclusions were based on findings that *customers* view at

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<sup>78</sup> *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (rel. Jun. 3, 2005) (requiring interconnected VoIP providers’ service to supply E911 capabilities); *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, 22 FCC Rcd 11275 (rel. Jun. 15, 2007) (extending to interconnected VoIP providers the same disability access requirements that apply to telecommunications service providers); *In the Matter of The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd 2650 (rel. Feb. 21, 2012) (extending outage reporting requirements to interconnected VoIP providers); *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (rel. Sept. 23, 2005) (finding that CALEA applies to interconnected VoIP providers).

<sup>79</sup> See, e.g., *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18479-80 ¶ 88 (rel. Nov. 17, 2005); *In the Matter of SBC Communications Inc.*

least some types of VoIP service to be a reasonable substitute for traditional telephone service,<sup>80</sup> they are readily applicable to Section 214 discontinuance proceedings, where the Commission considers whether affected customers will have access to reasonable substitutes for the service being discontinued.

### **B. 3G/4G Wireless.**

By last count, more than 45 percent of American households have given up landline phone service entirely.<sup>81</sup> Just as for interconnected VoIP, such evidence of consumer behavior is the best indicator that consumers view these services to be a reasonable substitute for traditional telephone service. Such wireless substitution is by no means limited to Millennials, though the fact that two-thirds of Americans aged 25 to 34 live in households with only wireless telephones

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*and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18338 ¶ 87 (rel. Nov. 17, 2005); *In the Matter of AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5712 ¶ 93 (rel. Mar. 26, 2007); *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21305 n.72 (rel. Dec. 5, 2007) (“For purposes of our analysis, we recognize competition from entities such as cable operators that utilize VoIP technology to provide voice services to their customers over their own network facilities -- that is, providers of ‘fixed’ VoIP service.”); *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8650 ¶ 54. Given its proposal to use the *Qwest Phoenix Forbearance Order* analysis to determine substitutability, it appears that NASUCA agrees that facilities-based VoIP service should be considered an adequate substitute for traditional telephone service. See *FNPRM* at ¶ 236 (citing NASUCA Comments at 25).

<sup>80</sup> See, e.g., *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5712 ¶ 92 (“[W]e find that mass market consumers view facilities-based VoIP services as sufficiently close substitutes for local service to include them in the relevant product market.”)

<sup>81</sup> See *CDC June 2015 Report* at 1.

is astonishing.<sup>82</sup> Large numbers of older Americans have abandoned landline voice service as well.<sup>83</sup>

CenturyLink recognizes that the Commission found five years ago that it lacked sufficient data to confirm that mobile wireless service is an effective substitute for traditional telephone service.<sup>84</sup> That data is now in hand. Late last year USTelecom submitted voluminous evidence on wireless substitutability in its forbearance petition.<sup>85</sup> That evidence included the pricing elasticity data the Commission found was necessary to determine that 3G/4G wireless service is an economic substitute for wireline TDM voice service, as well as other evidence demonstrating that wireless voice is an effective substitute for wireline voice service.<sup>86</sup> The Commission will thus have an opportunity to confirm in the near future that 3G/4G wireless voice service is a substitute for wireline TDM voice service.<sup>87</sup>

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<sup>82</sup> See *id.* at 2 (noting that more than two-thirds of adults aged 25 to 34).

<sup>83</sup> According to the latest CDC report, approximately 37 percent of adults aged 45-64 and 17 percent of adults aged 65 and over lived in households with only wireless telephones. See *id.* at 2. More than 59 percent of those living in poverty were living without wireline telephones. See *id.*

<sup>84</sup> See *Qwest Phoenix Forbearance Order*, 25 FCC Rcd 8622, 8651 ¶ 55.

<sup>85</sup> See Petition for Forbearance of the United States Telecom Association, *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-192 (filed Oct. 6, 2014).

<sup>86</sup> See *id.*, Expert Declaration of Kevin W. Caves, PhD ¶ 39 (noting that econometric work subsequent to the *Qwest Phoenix Forbearance Order* confirmed cross-price elasticity between wireless and wireline to be positive and economically significant); Expert Declaration of John Mayo, PhD ¶ 8 (noting that “[t]he shift to wireless cannot at this point simply be dismissed as a phenomenon embraced only by the young and tech savvy.”). See also *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8653 ¶ 58 (“Qwest has produced no econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services.”).

<sup>87</sup> Petition for Forbearance of the United States Telecom Association, *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory*

### **C. CAF-Qualifying Fixed Wireless Services.**

As noted, the Commission found in the CAF II proceeding that fixed wireless service meeting Rule 54.101(a)'s definition of "voice telephony service"<sup>88</sup> is a reasonable substitute for traditional telephone service and therefore eligible for CAF II support if included with broadband service meeting specified upload and download speeds. Conversely, CAF II support is unavailable in any census block in which a competitor offers fixed residential broadband and voice service—including fixed wireless service—with these characteristics.<sup>89</sup> Indeed, a large number of census blocks were ruled ineligible for CAF II for exactly this reason.<sup>90</sup> Given these holdings, the Commission should establish a rebuttable presumption that fixed wireless service meeting applicable CAF II requirements is a reasonable substitute for purposes of applications to discontinue service under Section 214.

### **IV. THE COMMISSION SHOULD EXPLORE ALTERNATIVE, AND MORE EFFECTIVE, MEANS OF PROTECTING END USERS UNIQUELY IMPACTED BY ONGOING TECHNOLOGY TRANSITIONS.**

CenturyLink recognizes that the proposed conditions in the *FNPRM* may be partially motivated by concerns about potentially vulnerable groups, such as the elderly and disabled, and others who may be reluctant to give up legacy services. In other words, despite the fact that the vast majority of consumers have already voluntarily migrated to VoIP, 3G/4G wireless or fixed wireless services, the Commission may believe that additional steps are necessary to address the unique needs of some customers remaining on those networks.

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*Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-192, Order, DA 15-1059 (rel. Sept. 25, 2015) (extending deemed granted date to Jan. 4, 2016).

<sup>88</sup> 47 C.F.R. § 54.101(a).

<sup>89</sup> See *supra* II.B.4.

<sup>90</sup> See, e.g., *In the Matter of Connect America Fund*, WC Docket No. 10-90, Order, 29 FCC Rcd 181, 192-94 ¶¶ 54-59 (rel. Jan. 10, 2014) (ruling 555 census blocks ineligible due to Blue Grass Cellular's offering of fixed wireless service).

To begin, the Commission should not presume that these newer technologies will not adequately protect the interests of these potentially vulnerable groups, given that it has already extended key public interest requirements, such as 9-1-1 and disability access, to these services. But, to the extent more needs to be done, these concerns are best addressed through education and outreach efforts.

There are also better ways to increase public acceptance of newer technologies. The Commission should first consider approaches it has used successfully for other technology transitions. In particular, to the extent the Commission is seeking to reassure reluctant end users that it is safe to transition to newer technologies, there are much more direct and effective approaches for meeting this objective than the cumbersome process proposed in the *FNPRM*. For example, in the DTV transition, the Commission successfully used public relations, education and other outreach methods to convince consumers to embrace the transition to a new generation of TV services.<sup>91</sup> The Commission could and should use a similar approach here. Public outreach and educational efforts will more effectively reassure consumers about new services and technologies than a series of protracted regulatory proceedings focused on such arcane questions as latency, jitter, and packet loss.<sup>92</sup>

Such education and outreach efforts would increase awareness of ongoing technology transitions and the options available to consumers, reduce potential misconceptions about these transitions, explain the benefits of new technologies and services, and address likely concerns,

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<sup>91</sup> See *FCC Continues DTV Outreach Across the Nation: Call Center Receives 900,000 in Days Surrounding Transition*, News Release (June 15, 2009), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-291400A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-291400A1.pdf).

<sup>92</sup> See Public Knowledge Comments, filed in WC Docket Nos. 05-25, et al., at 7 (Feb. 5, 2015) (“The best way to encourage people to embrace new technologies is to reassure them that [they] will not have to sacrifice functionality, reliability, safety, or consumer protections when they make the switch.”)

such as differences between services and compatibility of existing customer equipment. These efforts could also provide information and outreach targeted to particular demographics.

Education and outreach initiatives will be most effective as a shared endeavor between the government and communications providers. While providers may have existing relationships with their customers, the government is uniquely qualified to provide trusted information to the public. And, ultimately the Commission will need to exercise its leadership authority to move these technology transitions forward in the best interest of all consumers and the nation as a whole—just as it did in the DTV transition.

## **V. THE COMMISSION SHOULD NOT LENGTHEN THE DISCONTINUANCE PROCESS.**

The *FNPRM* also seeks further comment on extending existing notice periods for Section 214 discontinuance. The Commission should not change the existing 60- and 31-day benchmarks for automatic grant in Section 63.71 of the Commission’s rules. Carriers seeking to discontinue service have strong incentives to notify customers well in advance of a Section 214 filing in situations where customers will need extra time to accommodate the discontinuance. If they fail to give customers adequate time, one or more of those customers are likely to oppose the application, or ask for additional time, which will lead to an even longer discontinuance process. On the other hand, some discontinuance applications have little impact on customers, or can be easily accommodated by customers, and therefore require little, if any advance notice. A rule extending the current notice periods would ignore these variations and delay the transition to newer and better services.

## **VI. THE COMMISSION SHOULD NOT EXTEND THE EQUIVALENT ACCESS RULE.**

In the Order accompanying the *FNPRM*, the Commission adopted its proposal to establish an “interim” equivalent access rule that would last until the conclusion of the special

access proceeding.<sup>93</sup> Over the objections of ILEC commenters, the Commission applied this new rule to commercial wholesale platform services<sup>94</sup>—even though those services were offered on a voluntary basis, after the Commission concluded that such platform services could not be compelled under the Section 251/252 impairment standard. Now the Commission seeks comment on whether to extend this “interim” rule beyond the special access proceeding, at least for commercial wholesale platform services.

The Commission lacks legal authority to impose this requirement in any form. In addition to conflicting with Section 252 of the Communications Act, the rule essentially precludes an ILEC provider from exiting the market, by compelling it to offer a wholesale equivalent to the service it seeks to withdraw. Further, the *FNPRM*’s proposal to extend this rule beyond the conclusion of the special access proceeding confirms that the rule is not truly “interim” and therefore falls outside the scope of any heightened authority the Commission may possess to adopt interim or transitional rules. Wholesale access to an IP equivalent to the wholesale platform is also unnecessary, as CLECs such as Granite can, and do, use their own VoIP service as an alternative.<sup>95</sup> The Commission should not extend this rule and instead allow these commercial offerings to be governed by the marketplace.

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<sup>93</sup> See *In the Matter of Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5, 12-353, Order, 29 FCC Rcd 1433 ¶¶ 131-32 (rel. Jan. 31, 2014) (*Technology Transition Order*).

<sup>94</sup> *Id.* at ¶ 132.

<sup>95</sup> *VoIP Systems*, Granite Communications Inc. website, [http://www.granitecomm.com/voip-systems?\\_\\_hssc=94852675.4.1445716755782&\\_\\_hstc=94852675.6da35a07c9aef42498bdd46d43585ccc.1433894416514.1433894416514.1445716755782.2&hsCtaTracking=2809198e-92b9-452b-831b-bb0608f0412b%7Cbad3ab0f-a359-465d-ab05-44da87a0bb07](http://www.granitecomm.com/voip-systems?__hssc=94852675.4.1445716755782&__hstc=94852675.6da35a07c9aef42498bdd46d43585ccc.1433894416514.1433894416514.1445716755782.2&hsCtaTracking=2809198e-92b9-452b-831b-bb0608f0412b%7Cbad3ab0f-a359-465d-ab05-44da87a0bb07) (noting that Granite has been using VoIP technology since 2000) (last visited Oct. 24, 2015).

## **VII. CONCLUSION.**

For the reasons described herein, the Commission should not adopt the burdensome and unnecessary discontinuance rules proposed in the *FNPRM*. The Commission should instead recognize that more than three-quarters of consumers have already voluntarily substituted interconnected VoIP, 3G/4G wireless, CAF-qualifying fixed wireless and other TDM voice service for traditional telephone service. Given this reality, the Commission can best streamline its discontinuance process by establishing a rebuttable presumption that these services are reasonable substitutes for traditional telephone service. Such a presumption is fully consistent with the public interest and will provide the certainty and momentum to the IP transition sought in the *FNPRM*.

Respectfully submitted,

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